

No. 271.

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Brief of Cist & Cleveland for D

# Supreme Court of the United States

OCTOBER TERM, 1899.

Filed Feb. 26, 1900.

No. 271.

THE CINCINNATI, HAMILTON & DAYTON RAILROAD COMPANY,
Plaintiff in Error,

versus

BENJAMIN F. THIEBAUD, Administrator of Chris. Sweetman, Deceased,
Defendant in Error.

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In Error to the Circuit Court of the United States for the Southern District of Ohio.

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## Brief in Support of Motion to Dismiss or Affirm.

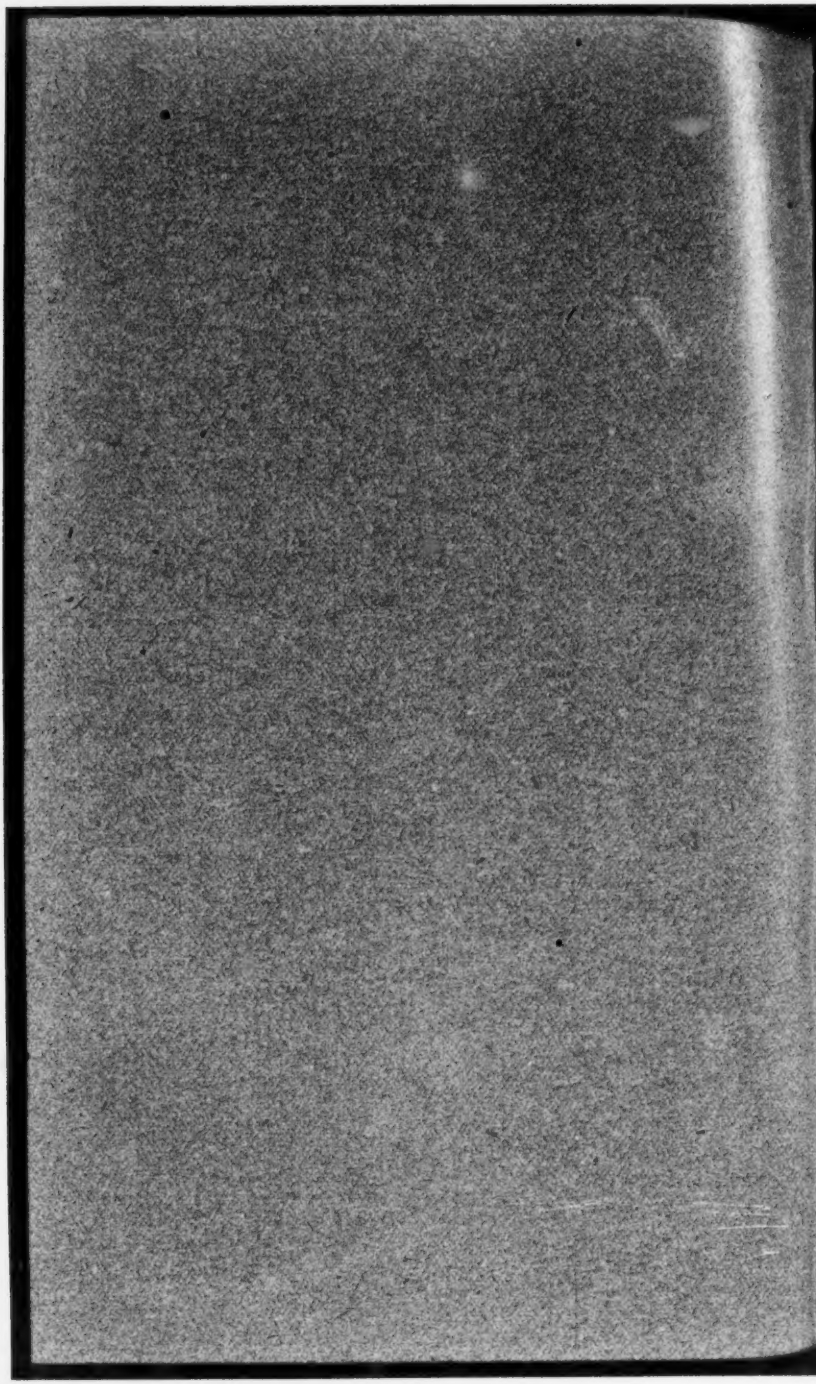
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*THE CINCINNATI, HAMILTON & DAYTON RAILROAD COMPANY,*
*Plaintiff in Error,*

No. 271. *vs.*

*BENJAMIN F. THIEBAUD, Administrator of Chris. Sweetman, Deceased,*
*Defendant in Error.*

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## Brief for Defendant in Error in Support of the Motion to Dismiss or Affirm.

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### STATEMENT.

This case comes into this Court on writ of error to the Circuit Court of the United States for the Southern District of Ohio.

The action was for wrongful death. Decedent was a locomotive engineer drawing defendant's pay train. He was killed September 18, 1896, near Connersville, Indiana, in a collision of the pay train with one of defendant's freight trains, caused by the negligence of the conductor and engineer in charge of the freight train and engine drawing same.

Plaintiff relied for recovery (Rec., p. 8) upon a statute of Indiana (Rev. Stat., Secs. 7083–7087) known as the "Employers Liability Act," which we print in full as an appendix hereto.

The bill of exceptions does not purport to contain all the evidence offered at the trial nor the charge of the Court to the jury thereon. It is therefore improper to attempt to state the facts

of the accident as shown by the testimony and proof at the trial, upon which the Court predicated its charge.

The Court charged the jury (Rec., p. 8), "among other things," that the defendant was not liable for negligence of the conductor and engineer of the freight train at common law, but that such liability was imposed by the said statute of Indiana, cited above, which plaintiff relied on to recover.

The jury rendered a verdict for plaintiff. A motion for new trial was overruled, and on August 30, 1898 (Rec., p. 14), a writ of error was sued out by the defendant from the Circuit Court of Appeals of the Sixth Circuit, where the case is now pending. Thereafter, on the 15th day of April, 1899 (Rec., p. 17), a second writ of error in the case was sued out from this Court upon which writ of error the case is before this Court on the motion to dismiss or affirm.

**The Motion to Dismiss.**

The motion to dismiss this case in this Court is based upon two grounds:

First. The writ of error from this Court was taken in this case while the case was pending in the Circuit Court of Appeals on writ of error from that Court. Plaintiff in error having elected to prosecute his writ of error in the Circuit Court of Appeals must abide by his election, and can not thereafter bring the same case into this Court by subsequent writ of error. Both the writs of error taken in this case undertake to bring up for review the whole case on the merits, the first to the Circuit Court of Appeals, the second to this Court.

In the case of *Columbus Construction Company* v. *Crane Company*, 174 U. S., 601, it was held that—

> "The judiciary act of March 3, 1891, c. 517, 26 Stat., 826, does not contemplate several separate appeals or writs of error on the merits in the same case and at the same time to two appellate Courts, and therefore, the writ in this Court, which was taken while the case was pending in the Circuit Court of Appeals ought to be dismissed."

Second. The sole ground upon which plaintiff in error invokes the jurisdiction of this Court is that the act of Indiana, re-

ferred to above, is in contravention of the Constitution of the United States, to-wit, the Fourteenth Amendment thereof, and hence under Section 5 of the act of March 3, 1891, a writ of error may be taken from this Court direct to the Circuit Court.

This might be true, but for the fact that the record shows no such claim made in the case in the Circuit Court. The claim appears for the first time in defendant's assignment of errors.

To give this Court jurisdiction in such case it must appear from the record that the Circuit Court in some manner passed upon or decided the constitutional question. The record shows that no such question was raised, dealt with or passed upon by the Circuit Court. No such question having been raised at the trial, the defendant can not present to a reviewing Court an assignment of error upon a claim as to which the trial Court made no ruling.

In *Cornell* v. *Green*, 163 U. S., 75, the Court say:

"The appellate jurisdiction of this Court is sought to be maintained upon the single ground that the case 'involves the construction or application of the Constitution of the United States,' within the meaning of the judiciary act of March 3, 1891, c. 517, Sec. 5 (26 Stat., 828).

"But in order to bring a case within this clause of the act, the Circuit Court must have construed the Constitution or applied it to the case, or must at least have been requested, and have declined or omitted, to construe or apply it. *No construction or application of the Constitution can be said to have been involved in the judgment below, when no construction or application thereof was either expressed or asked for.* . . . .

"In a case decided at this term it was said by the Chief Justice, in delivering judgment:

"A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege or immunity is claimed under that instrument; but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the Court below can be revised on the ground of error in the disposal of such a claim by its decision. And it is only when the constitutionality of a law of the United States is drawn in question, not incidentally, but necessarily and directly, that our jurisdiction can be invoked for that reason. *An assignment of errors can not be availed of to import questions into a cause which the record does not show were raised in the Court below, and rulings asked thereon, so*

*as to give jurisdiction to this Court under the fifth section of the act of March 3, 1891.* (*Ansbro* v. *U. S.*, 159 U. S , 695, 697, 698).

"In support of that judgment several cases were cited, two of them very like the case at bar: *Carey* v. *R. R Co.*, 150 U. S., 170, 181; In re Lennon, 150 U. S., 393, 401."

If this were not the rule, then the defeated party in any case in the Circuit Court in which the recovery was based upon a statute of a state might, at his option, take the case to the Supreme Court, or to the Circuit Court of Appeals, by making or omitting to make in his assignment of errors a claim that the statute was in contravention of the Constitution of the United States. We submit this is not the law, that a party must determine at the trial on what issues he will submit his case and can not assert in the appellate court claims which he waived or omitted to urge at the trial.

### The Motion to Affirm.

If, however, the Court should consider that the motion to dismiss ought not to be granted, and that although the record shows that this Court has jurisdiction, yet that there was color for the motion to dismiss and should proceed to the consideration of the case, we respectfully submit in support of the motion to affirm the following examination and discussion of the assignments of error and the claims thereunder made in the case by counsel for plaintiff in error.

## ARGUMENT.

### I.

The first assignment of error is:

"That the Court erred in charging the jury that the defendant was liable under the act of Indiana, March 4, 1893."

This assignment ought not to be considered for the reason that the bill of exceptions does not purport to contain all the evidence in the case.

The charge of the Court complained of in the assignment of error is equivalent to a peremptory instruction to find for the plaintiff. In the absence of a bill of exceptions showing all the

evidence it is to be presumed that there was evidence justifying the charge.

In *Ry. Co.* v. *Cox*, 145 U. S., 593, the Court held:

"The bill of exceptions does not purport to contain all the evidence, and it would be improper to hold that the Court should have directed a verdict for defendant for want of that which may have existed."

In *Lincoln Savings Bank* v. *Allen*, 82 Fed., 149, the Court say:

"This printed record does not contain all the evidence that was presented to the Court below. . . . . After a trial Court has submitted a case to the jury, the burden of proof to show that there was no evidence to warrant that course is on him who asserts it. If he would maintain his claim, he must present all the evidence to the appellate court, in order that that Court may see for itself what the evidence was. If he fails to do so, he can not prevail upon that issue. *Railway Co.* v. *Washington*, 49 Fed., 347, 350, 353; *Railway Co.* v. *Harris*, 63 Fed., 800, 805; *U. S.* v. *Patrick*, 73 Fed., 800, 806."

And on page 153:

"The presumption is that the evidence before the Court below warranted this charge, and we can not review it in the absence of a certificate that all the evidence upon these questions is before us."

See also: *Assn.* v. *Robinson*, 74 Fed., 10.
*Taylor Craig* v. *Hage*, 69 Fed., 581.
*Ry. Co.* v. *Lorentzen*, 79 Fed., 291.
*U. S.* v. *Patrick*, 73 Fed., 800.
*Ry. Co.* v. *Harris*, 63 Fed., 800.
*Ry. Co.* v. *Washington*, 49 Fed., 347.
*Honey* v. *Ry. Co.*, 82 Fed., 273.
*Crawford* v. *Foster*, 83 Fed., 975.
*Lumber Co.* v. *Stump*, 86 Fed., 584.
*R. R. Co.* v. *Ives*, 144 U. S., 408.
*Carroll* v. *Peake*, 1 Pet., 18.

The justice and propriety of this rule is well shown in the case at bar. We understand the claim of counsel under this and the third assignment of error to be that the case made out by the plaintiff below was not within the provisions of the act of Indiana. In the absence of a bill of exceptions showing all the evidence it can not be presumed but that all the facts necessary to bring the

case within the provisions of any one of the sections of the act were proved, so that the Court was authorized to instruct the jury that the defendant was liable under that act. On the contrary, it is to be presumed that at the trial there *was* evidence to support the charge, especially as the record does show (Rec., p. 8) that the plaintiff "relied upon that act for recovery." Such proof received without objection on the part of defendant and followed by a verdict would operate to aid and cure any defect or uncertainty in the allegations of the petition, if any such existed, especially as defendant made no objection based on the allegations of the petition. *R. R. Co.* v. *O'Reilly*, 138 U. S., 334.

The petition contained a general charge of negligence on the part of the defendant, its servants, agents and employes, operating an engine of defendant, resulting in the death of plaintiff's intestate "while in the employ of defendant as an engineer running a locomotive engine of a train operated by defendant on its said railroad and while so engaged in the discharge of his duties." It was not necessary to set out or refer to the statute in the petition in the Circuit Court of the United States, for the Federal Courts take judicial notice of all general statutes of the several states.

If the defendant had desired a more particular statement of the cause of action with specifications of negligence complained of this could have been accomplished by a motion to make more definite and certain. The petition was good against demurrer and sufficiently stated that plaintiff's intestate was acting in the line of his duties.

In *Gulf, C. & S. F. R. Co.* v. *Washington*, 49 Fed., 349, the Court say :

"Indefiniteness or uncertainty of statements in a complaint which, when construed in the most liberal manner, states the substance of a cause of action, is not a ground of demurrer, but is a defect to be corrected by motion for a more specific statement. The complaint will be treated as alleging by implication every fact which can be implied from its averments by the most liberal intendment. It is very well settled that a general allegation of negligence, without stating the particular acts which constituted the negligence, is good against a general demurrer. *Harper* v. *Railroad Co.*, 36 Fed. Rep., 102."

The case, however, even on the bill of exceptions as presented, is clearly within the provisions of Subdivisions III. and IV. of Section 1 of the Act.

The provisions of the Subdivision III. of Section 1. of said act, pertinent here, are :

"Where such injury resulted from the act or omission of any person done . . . . in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf."

Without waiving the point that the record does not show that all the evidence bringing the case within this subdivision is before this Court, we submit that the record does show that the injury resulted from the act of the engineer and crew done in obedience to the particular instructions given by the conductor as a person delegated with the authority of the corporation in that behalf. It appears (Rec., p. 9), that the injury resulted from the acts of the conductor of freight train No. 95, who ordered part of his train left on side track, and without leaving a flagman to signal approaching trains, went to the next side track, there deposited the cars, and then ran back with the engine to get the cars left on the first side track, and that this was negligence. It is manifest that unless the train crew and engineer had acted in obedience to the particular instructions of the conductor, who was the person delegated with the authority of the corporation in that behalf, these dangerous manœuvres could not have been performed. And it is also clear that the omission of the flagman to remain and guard the switch was in obedience to the conductor, for the record shows (p. 9) that the "*conductor* failed to leave a flagman." He was therefore directly responsible for the omission of the flagman to be at his post, where he could signal approaching trains.

The case is also within Subdivision IV. of Section 1 of said act, the provisions of which are as follows :

"Fourth. Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, roundhouse, *locomotive engine or train upon a railway*, or where such injury was caused by the negligence of any person, co-employe or fellow

servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employe or fellow servant, at the time acting in the place, and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws."

The record shows (Rec., p. 9) that deceased was killed by the negligence of the engineer and conductor of the freight train, to-wit, "persons having charge of a locomotive engine and a train upon a railway."

It is contended by counsel that this applies only to "persons injured who are obeying and conforming to the order of some superior at the time of such injury, having authority to direct."

The allegation of the petition was that the decedent was killed in Indiana while "in the employ of the defendant as an engineer running a locomotive engine of a train operated by defendant on its said railroad between Indianapolis, Indiana, and Hamilton, Ohio, and while so engaged in the discharge of his duties upon said engine and without fault on his part." These are allegations not only implying, but in every respect inconsistent with any other theory than that decedent was obeying the orders of some superior having authority to direct him. It is common knowledge that an engineer running a locomotive in the discharge of his duties while employed by a railroad company must be obeying and is acting under orders of his superior, either the train dispatcher, superintendent or some other officer.

Under this allegation it appeared that (Rec., p. 9), "the deceased had the right to be with his train at the place where and at the time when he was, and was guilty of no negligence." And we again invoke the rule, that unless the bill of exceptions, which counsel saw fit to present, is shown by the record to contain all the evidence adduced at the trial, this Court will not consider whether or not the facts which the Court below permitted to be proved at the trial under the allegations in the petition were sufficient to bring the case within the statute. There is nothing in the record to show that there was not introduced in evidence the special orders of the train dispatcher under which decedent

was running his engine and the rules of the company requiring decedent to obey such orders and counsel has no right, having elected to take a partial bill of exceptions only, to ask that this Court assume that no evidence was offered on this point.

But we deny that the act should be so construed and we deny that such construction has been put upon it by the Supreme Court of Indiana.

In the case of *Ry. Co.* v. *Little's Admx.*, 149 Ind., 167, the Court, (p. 170), deals with the third and fourth subdivisions of Section 1 of the Act and separates the specifications of exemption from the fellow servant rule, as follows:

"The third and fourth subdivisions of Section 1 of the Act of March 4, 1893 (Acts, 1893, p. 294; Rev. St., 1894, Sec. 7083), are as follows, our figures separating them into specifications of exemption from the fellow servant rule: (1) 'Third. Where such injury resulted from the act of omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or' (2) 'in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf.' (3) 'Fourth. *Where such injury was caused by the negligence of any person, in the service of such corporation, who has charge of any* signal, telegraph office, switch yard, shop, roundhouse, *locomotive engine or train upon a railway*, or' (4) 'where such injury was caused by the negligence of any person, co-employe or fellow servant engaged in the same common service, in any of the several departments of service of any such corporation, the said person, co-employe or fellow servant at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior, at the time of such injury having authority to direct; but nothing herein contained shall be construed to abridge the liability of the corporation under existing law.'"

Inasmuch as the injury was caused by the negligence of the engineer and conductor of the freight train, the case comes precisely within the language of that part of the act which the Supreme Court of Indiana separate as specification 3 in the above quotation, *aud the Court does not, in separating the language, attach to it the qualification contended for by counsel* that "the person injured must be obeying or conforming to the order of some superior, at the time of such injury, having authority to direct."

The precise point, however, was decided in *Ry. Co.* v. *Montgomery*, 152 Ind., 1, adversely to the contention of plaintiff in error. The Court held on a demurrer to the complaint that the words "obeying or conforming to the order of some superior at the time of such injury" were merely equivalent to the words "acting in the line of duty as an employe of the defendant."

The Court say, construing this subdivision:

> "It is only required to state that the engineer, while in the service of appellant in charge of a locomotive engine, negligently injured the appellee, both being at the time acting in the line of duty as employes of the appellant."

The allegations of the petition in the case at bar are in equivalent language, and the proof in the case, as well as counsel's solemn admissions at the trial, evidenced the fact that decedent was "at the time acting in the line of duty as an employe of defendant and was conforming to the orders of his superior."

It should perhaps also be said that the pleadings in the case at bar are not necessarily to be judged by the Indiana rules or Indiana code, as the action was brought and tried in Ohio.

II.

**The Act is Constitutional.**

The claims of plaintiff in error under the second and fourth assignments of error are that the statute of Indiana contravenes the Fourteenth Amendment of the Constitution of the United States and also the Constitution of Indiana.

We have already called attention to the fact that the record shows no such claim made or passed upon by the trial Court, and have submitted authorities indicating that this Court will not consider such question on review unless it appears that it was presented at the trial.

The question whether or not the act contravenes the Constitution of the state of Indiana has been before the highest Court of that state and the validity of the statute upheld. *Ry. Co.* v. *Montgomery*, 152 Ind., 1. This Court has held in numerous cases that such decision is binding upon the Federal courts. *Fallbrook*

*Irrigation Dist.* v. *Bradley*, 164 U. S., 112; *Oakes* v. *Mase*, 165 U. S., 363; *Forsyth* v. *Hammond*, 166 U. S., 506; *Bank* v. *Pennsylvania*, 167 U. S., 461.

The objections made by counsel for plaintiff in error that the statute contravenes the Fourteenth Amendment to the Constitution of the United States are:

1. That the classification attempted to be made by it is based not on the character of employment, but on the character of the employers.

The answer to this objection is that the Supreme Court of Indiana in the case of *Ry Co.* v. *Montgomery*, 152 Ind., 1, has passed upon this question and held, construing this statute, that the classification intended by the statute was based on the character of the occupation or employment. This judicial interpretation by the highest Court of the state becomes by the familiar rule a part of the statute itself and equally binding upon the Federal court. If the statute as administered by the courts of Indiana adopts the classification based upon employment, then that becomes the character of the statute whose constitutionality this Court is asked to try, and the statement of counsel that the statute adopts some other or different classification is without foundation.

2. That even if such classification can not be assumed to have been the intent of the Legislature, yet the act can not be sustained as an act applying to railroad corporations alone, and two reasons are alleged.

First. That the act discriminates between railroad corporations and individuals or copartnerships operating a railroad.

This point was disposed of by the Supreme Court in *Railway Co.* v. *Mackey*, 127 U. S., 205, in which case the Court say:

> "The hazardous character of the business of operating a railroad would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employes as well as the safety of the public."

Second. That to so limit the operation of the act is not to give effect to what appears to have been the intent of the Legislature.

This is also answered by the decision on this point by the Supreme Court of Indiana in the case of *Ry. Co.* v. *Montgomery*, 152 Ind., 1, where the Court held that the act was applicable to railroad corporations and constitutional as to such corporations without reference to its application to other corporations or the validity of its provisions when attempted to be applied to such other corporations.

On a question of construction, or of giving effect to the legislative intent, the decision of the Court of last resort construing a statute of its own state will be followed by the Federal courts. *Noble* v. *Mitchell*, 164 U. S., 367.

## III.

### The Circuit Court Had Jurisdiction.

The right asserted in this case arose under the Statute of Indiana. The liability imposed upon the defendant is fixed and controlled by the laws of that state. The person who can maintain the action must be discovered by an examination of the provisions of the Indiana law.

*Dennick* v. *R. R. Co.*, 103 U. S., 11–17, 18.
*I. C. R. Co.* v. *Ihlenberg*, 75 Fed. Rep., 873, 879.
*B. & M. R. Co.* v. *McDuffey*, 79 Fed. Rep., 934, 936.

It is, therefore, immaterial in this case, what right would have arisen or what liability would have been imposed had this accident, resulting in death, happened in Ohio, or Maryland, or in the District of Columbia, or Nebraska, or in whom the right of action in either of such events would have been vested, or who would have been the real or who the nominal parties to the record under statutes in the one or the other of those jurisdictions. Only so far as those statutes resemble the Indiana statute can decisions construing them bear upon the interpretation of the latter.

The Indiana Statute is as follows :

" When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the lat-

ter for an injury for the same act or omission. The action must be commenced within two years. The damages can not exceed ten thousand dollars and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

Burns, Rev. Statutes, 1894. Sec. 285. (284).

Under this section of statute it has been held in Indiana that the fund, when recovered, is held by the personal representative, whether domestic or foreign, as the *trustee of an express trust* to inure to the benefit of the widow and children, if any, and if not, to the next of kin.

*Memphis & Cincinnati Packet Co.* v. *Pikey, Admx.*, 142 Ind., 304, 311.

Citing,

*Jeffersonville, etc., R. R. Co.* v. *Hendricks, Admr.*, 41 Ind., 48.

*Dennick* v. *R. R. Co.*, 103 U. S., 11.

In *Yelton, Administrator*, v. *Evansville & Indianapolis R. R. Co.*, 134 Indiana, page 414, it is said in reference to an action under this section, where the widow, being the sole beneficiary, had attempted to compromise the liability of the defendant railroad after suit had been commenced by the administrator, that—

"It must be prosecuted by the administrator. This being true, if the widow can compromise the cause of action and release the damages so as to terminate the suit, it places the administrator in the anomalous position of having the sole right to prosecute the action, and yet gives to the widow, or children, if there be children, the right to compromise the action outside of court, and cancel the claim for damages upon which the action is based. *While it would give to the administrator the sole right to prosecute the action, yet he would not have the sole right to control the prosecution of the action once commenced. It would seem that the law which authorized a person to prosecute an action, would give him, by necessary implication, the right to control such prosecution, and not permit one not a party to the action, and having no right to be a party to the action, the right to compromise the action. While actions under this section of the statute are prosecuted for the benefit of and the damages inure to the exclusive benefit of the widow and children of the deceased, yet it contemplates the collection of the damages by the administrator, and the turning of the same over to the widow and children on final settlement.* . . . . The action is in favor of the personal representatives of the deceased, and the

widow has no power to control the prosecution of the action or interfere with its prosecution or make settlement of the cause of action. It is the damages in such action that inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.

"In Iowa there is a statute very much the same as the one in this state and is in effect the same. It provides that 'when a wrongful act produces death the damages shall be disposed of as personal property belonging to the estate of the deceased, except that if the deceased leaves a husband, wife, child, or parent, it shall not be liable for the payment of debts.'

"Section 3731, Iowa Rev. Statutes, 1888.

"In the case of *Dowell, Admr.*, v. *the Burlington, etc., Ry. Company*, 62 Iowa, 629, it is held that, in an action brought by the administrator to recover damages resulting from the death of the intestate, the widow of the deceased could not release the claim. The Court said:

"'She is not and was not the administratrix and could not release the claim of the estate of the intestate based upon his death through negligence of the defendant.'

"The action is the same in this state. *It is a right of action given to the personal representatives of the deceased*, the damages recovered to inure to the benefit of the persons named in the act.

"*It is a continuation in the personal representative, of the cause of action which would have existed for the negligence in favor of the deceased, if he had survived. Long* v. *Morrison*, 14 Ind., 595. The administrator would have the same right to control the action that the deceased would have had, had he survived and prosecuted it. *Rodgers, Admr.*, v. *Zook*, 86 Ind., 237. The administrator of the estate could not make a compromise and settlement of the action, except by the authority of the Court. He had the right to prosecute the action to final judgment, and accept and collect the amount of damages assessed, but he had no right to compromise and adjust the claims without the order of the Court.

"*Markell's Admr.* v. *Spiller's Admr.*, 28 Ind., 488.

"2d Warner on Amer. Law of Administrators, p. 683, 11, Sec. 326."

In *Dennick* v. *R. R. Co.*, 103 U. S., 11, it is said, on page 20:

"Again: It is said that by virtue of her appointment in New York, the administratrix can only act upon or administer that which was of the estate of the deceased in his life-time. There can be no doubt that much that comes to the hands of administrators or executors must go directly to heirs or devisees, and is not subject to sale or distribution in any other mode, such as

specific property devised to individuals, or the amount which by the legislation of most of the states is set apart to the family of the deceased, all of which can be enforced in the courts; and no reason is perceived why the specific direction of the law on this subject may not invest the administrator with the right to receive or recover by suit, and impose on him the duty of distributing under that law. There can be no doubt that an administrator clothed with the apparent right to receive or recover by suit property or money may be compelled to deliver or pay it over to some one who establishes a better right thereto, or that what he so recovers is held in trust for some one not claiming under him or under the will. And so here. The statute of New Jersey says the personal representative shall recover, and the recovery shall be for the benefit of the widow and next of kin."

This relation of trustee, and the ability to prevent or determine the institution or prosecution of the action, or exercise full control over it when brought, are the elements which distinguish a right of action under the Indiana statute from one under the Maryland and similar statutes. There the action is by the terms of the statute brought in the name of some one for the use of others. Thus the principle stated in

*McNutt* v. *Bland*, 2 How., 9,
*Maryland* v. *Baldwin*, 112 U. S. 490,
*Stewart* v. *the B. & O. R. R. Co.*, 168 U. S., 445,
*Huff* v. *Hutchinson*, 14 How., 586,

and similar cases is inapplicable to the present case.

In such cases the real plaintiff is by a positive rule of law compelled to use the name of another who has not and never will have any real interest or control over the action. Under the Indiana statute the position of the administrator is just the reverse.

In *Coal Company* v. *Blatchford*, 11 Wall., 172, Mr. Justice Field refers to this distinction, and after commenting upon and explaining the cases of *Browne* v. *Strode*, 5 Cranch, 303, and *McNutt* v. *Bland*, 2 Howard, 9, where actions were brought on official bonds, in the names of Justices of the Peace for the use of an alien in the one case, and of the Governor of Mississippi for the use of a citizen of New York in the other, says, page 177:

"There is no analogy between these cases and the case at bar. The nominal plaintiffs in those cases were not trustees and held nothing for the use or benefit of the real parties in interest. *They could not, as is said in McNutt* v. *Bland, prevent the institu-*

*tion or prosecution of the actions or exercise any control over them. The Justices of the Peace in the one case and the Governor in the other, were the mere conduits through whom the law afforded a remedy to the parties aggrieved.*"

This distinction was re-affirmed in *Knapp* v. *Railroad Company*, 20 Wall, p. 117, where the question was as to whether or not trustees under a mortgage were nominal parties or the real parties in interest. The Court says, p. 123:

"They are the real plaintiffs in any suit brought to enforce a claim accruing to them in the execution of their trust, as much so as executors and administrators are who also sue for the benefit of others and not themselves. *Like them they control the litigation and are charged with the responsibility of conducting it.* The true line of distinction between nominal and real parties to an action is pointed out by this Court in the recent case of *Coal Company* v. *Blatchford*. (Quoting as above).

"The position of Knapp as surviving plaintiff is very different. He is not a mere passive instrument in the litigation. On the contrary he is active in promoting it, and would be remiss in his duty if he failed in using all proper means to bring it to a successful issue. *As the cause of action is vested in him, the Court looks to his citizenship in determining the question of jurisdiction, and not to the residence* of those persons who are beneficially interested in the subject matter of the litigation."

The statement in *New Orleans* v. *Gaines' Administrator*, 138 U. S., 595, on page 606, where the Court says:

"We have repeatedly held that representatives may stand upon their own citizenship in the Federal courts irrespective of the citizenship of the persons whom they represent, such as executors, administrators, guardians, trustees, receivers, etc."

summarizes the result of the decisions of the Court beginning with

*Chappedelaine* v. *Dechenaux*, 4 Cranch, 306,

and followed in

*Childress* v. *Emory*, 8 Wheaton, 642,
*Clark* v. *Mathewson*, 12 Peters, 164, 171,
*Bonnafee* v. *Williams*, 3 How., 574,
*Osborn* v. *Bank*, 9 Wheaton, 738,
*Irvine* v. *Lowry*, 14 Peters, 298,
*Rice* v. *Houston*, 13 Wall., 66,
*Davis* v. *Gray*, 16 Wall., 220,
*Florida* v. *Anderson*, 91 U. S., 676,
*Walden* v. *Skinner*, 101 U. S., 589,

and of numerous Circuit Courts, such as

*Davies* v. *Lathrop, Receiver*, 12 F. R., 353, 358,
*Morris* v. *Lindauer*, 54 F. R., 23,
*Shirk* v. *City of LaFayette*, 52 F. R., 857,
*Banks* v. *Teaneridge*, 60 F. R., 963, 965,
*Pennington* v. *Smith*, 78 Fed. Rep., 399,
*Reinach* v. *Atlantic & G. W. R. R. Co.*, 58 F. R., 33, 37,
*Popp* v. *Ry. Co.*, 96 Fed. Rep., 465.

In *Railway Company* v. *Whitton's Administrator*, 13 Wall., 270, an administrator who was a citizen of Illinois, was allowed to remove an action under the act of Congress of March 2, 1867, from the state court of Wisconsin to the United States Court on the ground of diverse citizenship, it being an action to recover damages for the wrongful death of the plaintiff's intestate under the Wisconsin statute.

In *Noonan* v. *Delaware L. & W. R. Co.*, 68 F. R., 1, a citizen of New Jersey, as administrator, sued under the New Jersey statute a citizen of Pennsylvania in the Federal court in New York for wrongfully causing the death of his intestate in New Jersey, and the defendant having appeared generally the jurisdiction of the Court was sustained.

In *Harper* v. *Norfolk & W. R. R. Co.*, 36 Fed. Rep., 102, an administrator, a citizen of Tennessee, sued under the Virginia statute a citizen of Virginia in the United States Court of West Virginia for wrongfully causing the death of his intestate in Virginia. The defendant pleaded that the deceased was a citizen of the state of Virginia and left a widow and children surviving him, who were likewise citizens of the state of Virginia. The Court overruled the plea, saying (p. 103):

"It is conceded that the plaintiff, the administrator of Anderson Harper, is a citizen of the state of Tennessee, and that the defendant is a resident of the state of Virginia; but the defendant contends that Isaac Harper, the administrator of Anderson Harper, is merely a nominal party to the record; that the widow and children of Anderson Harper are the real parties in interest in this action; that the administrator is a mere instrument or conduit through whom the rights of the real plaintiffs are asserted. To sustain this position, counsel for the defendant relied chiefly on *Browne* v. *Strode*, 5 Cranch, 303; and on *McNutt* v. *Bland*, 2 How., 9."

After explaining those cases, the Court further said :

" The principle decided in these two cases is that a public officer to whom an official bond is made payable, and whose name must be employed by the plaintiff in a controversy between citizens of different states, or an alien and a citizen, can not be considered a party litigant. *McNutt* v. *Bland*, *supra*. Can it be said in the case at bar that the plaintiff, the administrator of Anderson Harper, is not a party litigant? He is in no sense a public officer. He is the actor in the controversy. The law compels him to be such. By statute the legal right to bring this action is vested in him. No other party can bring it, nor in any way be a party plaintiff to it. In *Bonnafee* v. *Williams*, 3 How., 574–577, the Court says : ' Where the citizenship of the parties gives jurisdiction, and the legal right to sue is in the plaintiff, the Court will not enquire into the residence of those who may have an equitable interest in the claim. A person having the legal right may sue at law in Federal courts, without reference to the citizenship of those who may have the equitable interest.' "

*Goff's Admr.* v. *N. & W. R. R. Co.*, 36 F. R., 299, 301, is to the same effect.

*Popp* v. *Ry. Co.*, 96 Fed. Rep., 465, is a decision on the exact question involved in this case.

It is in the light of these cases that the case of *Stewart* v. *B. & O. R. R. Co.*, 168 U. S , 445, and the cases therein cited and relied upon by plaintiff in error must be considered.

In that case, the accident, which resulted in the death of the person on account of which recovery was sought, happened in Maryland and the statute provided that such action should be for the benefit of the wife, husband, parent and child of the person whose death should have been so caused, and should be brought in the name of the state of Maryland. Rev. Code, Maryland, 1878, p. 724. " This practice," of bringing a suit in name of one to the use of another, " is familiar with the Maryland courts, and when the action originates in that form the *cestui que use* is regarded as the real party to the suit."

*Gaither* v. *Farmers & Merchants Bk.*, 1 Pet., 42.
*Stewart* v. *B. & O. R. R. Co.*, 168 U. S , 449.

The action was brought in the name of the administrator appointed in the District of Columbia " for the benefit of the persons designated in the statute of Maryland." The statute of the District of Columbia authorized no such action to be brought ex-

cept where the accident happened in that district, in which event it authorized an action *in the name of the administrator*. The result was that the action, in place of being brought in the name of the state of Maryland for the use and benefit of the beneficiaries under the Maryland statute, was brought under that statute in the District of Columbia in the name of the administrator for the use and benefit of the same parties. The statute of Maryland gave the state of Maryland, the nominal plaintiff, no control of the action, nor did it make the institution of the suit depend upon any act of the nominal plaintiff, nor even make the nominal plaintiff a trustee for whatever was recovered for the benefit of the beneficiaries. The beneficiaries could bring the action and control it when brought. It, therefore, belonged, so far as real and nominal parties were concerned, to that class of cases " where the real and only controversy was between citizens of different states or an alien and a citizen and the plaintiff is, by some positive rule of law, compelled to use the name of another to perform merely a ministerial act, who is not, or never had any interest in or control over it." *Walden* v. *Skinner*, 101 U. S., 589, and where, therefore, the courts of the United States do not consider any others as parties to the suit than the persons between whom the litigation before them really existed.

The only question, therefore, in the Stewart case was whether it was an essential prerequisite to the suit that the nominal plaintiff should be the state of Maryland for the use of the beneficiaries. It not being contrary to the public policy of the District of Columbia to recover damages for wrongful death, the Supreme Court held, in accordance with its previous decisions and those already cited that under such circumstances as the state of Maryland would have been a nominal party, the administrator, in whose name the action was brought, was also a merely nominal party, in suing under the Maryland statute for the beneficiaries therein named and that the real parties in interest in either event were the beneficiaries.

From what has been heretofore said, it is apparent that the Indiana statute is not of that character, but that it vests in the administrator, whether domestic or foreign, the absolute control and right to institute, conduct, and with the approval of the Pro-

bate Court by whom he was appointed, to compromise the litigation, and after taking out the expenses thereof, to distribute the proceeds as provided by the statute, to those to whose interest they inure. If no such distribution were made, he could be compelled, as trustee of an express trust, to make such distribution. The beneficiaries could not have maintained the action in the name of the administrator, nor could they, under the Indiana statute, have exercised any control over it. On the contrary, under the Maryland statute, the beneficiaries could have instituted the action in Maryland in the name of the state for their use, and the Supreme Court held they could do so in the District of Columbia in the name of the administrator, just as in *McNutt* v. *Bland*, a citizen of a state, other than Mississippi, was allowed to institute a suit in the name of the Governor of Mississippi, to whom the bond had been given, for his use and benefit; or, as in *Huff* v. *Hutchinson*, persons who were citizens of a different state were allowed to institute a suit on an attachment bond in the name of the former Marshal of the United States for their use and benefit; or, as in *Maryland* v. *Baldwin*, parties interested were allowed to institute in the name of the state of Maryland for their use and benefit a suit on the administrator's bond taken in the name of the state; or, as in *Browne* v. *Strode*, 5 Cranch, 303, an alien was allowed to institute an action in the name of Justices of the Peace of Virginia against citizens of Virginia, in the United States Court on a bond taken in the name of the Justices of the Peace for their benefit.

So far as the case of *Wolf, Admr.*, v. *Ry. Co.*, 55 O. S., 517, is concerned, it is to be borne in mind that the question involved in that case was as to whether or not the contributory negligence of the administrator defeated the recovery, and also to what extent the contributory negligence of any of the beneficiaries likewise defeated the recovery. In that connection alone the language relied upon is used. Unquestionably, as the administrator had no personal pecuniary interest in the recovery, his contributory negligence would not defeat the action. It was otherwise with the contributory negligence of a beneficiary, who would ultimately get the money.

In addition, the statute of Ohio directs simply that the action

should be brought *in the name of the administrator;* and, as the Court remarks, does not even say that he should bring the action, but only that it should be brought in his name. It may be an open question in view of the decision in *Dennick* v. *R. R. Co.*, 103 U. S., 11, whether the provision that the action should be brought in the name of the administrator does not also imply that the administrator should institute and control the suit and thereby be the only person to determine whether or not it should be brought.

In *Dennick's case* a similar statute of New Jersey was so construed, and even in *Wolf* v. *the Ry. Co.*, it is said, page 530:

"The administrator is only a trustee for the beneficiaries and has no interest in the case for himself or the estate he represents."

And again, on page 537:

"It is therefore clear that the statute throughout is distributive in its character and that the damage should be assessed only for the benefit of those who are not guilty of contributory negligence, and that when recovered the damages should be distributed by the Probate Court only among such as the verdict of the jury shall show to be entitled thereto. This throws no clog in the way of the prosecution of the action by the administrator, and awards damages to those who are without fault, and does not reward those who contributed to the injury."

The prior decisions of the Supreme Court of Ohio, also render it at least doubtful whether in a case where the beneficiaries should attempt to bring the action in the name of the administrator they would be allowed to do so.

*Weidner* v. *Rankin*, 26 O. S., 522.
*Steel, Admr.*, v *Kurtz*, 28 O. S., 191.

However this may be, it is immaterial in view of the Indiana statute. That statute provides that when the death of one is caused by the wrongful act or omission of another, *the personal representatives of the former may maintain an action therefor against the latter* if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission.

The right of action is distinctly vested in the administrator. He is the real, not the nominal party. He can maintain it and he alone, and the statute merely continues in him a right of ac-

tion which would have vested in the decedent had the latter not died. These rights of his determine his status on the record in this case.

In view of the foregoing authorities such cases as those of *Indiana, ex rel Stanton*, v. *Glover*, 155 U. S., 513, and *Blacklock* v. *Small*, 127 U. S., 96, seem irrelevant. It will certainly not be maintained that the Court in the former case asserted that a trustee could never bring an action as trustee against one in the Federal courts if any of the *cestuis que trust* were not also citizens of some state other than that of the defendant. Such a proposition would overthrow the jurisdiction in almost every railroad foreclosure suit that has been brought in the Federal courts and overrule repeated decisions of the Supreme Court.

*Dodge* v. *Tulleys*, 144 U. S., 451, 455, 456.

An examination of the case of *Indiana, ex rel Stanton*, v. *Glover*, will show that the reference to the *cestui que trust* being citizens of other states than Indiana, was occasioned by the fact that, the suit was on an official bond for violation by the defendant of his duties as an officer in issuing certain certificates of indebtedness contrary to the law, of which Stanton and those he represented were the assignees and holders from one Pollard whom it did not appear could have prosecuted the suit in the Circuit Court of Indiana.

It is apparent from the case also that the certificates had been assigned to Stanton for the purpose of bringing the suit in question.

The following quotation from *Blacklock* v. *Small*, 127 U. S., 96, will dispose of any supposed bearing that that case has on this controversy (page 104):

"The bond was a unit; the mortgage was a unit; and the assignment of the bond by Blacklock to Robertson in trust for the children of Blacklock was a unit. The bond can not be enforced against Small, nor can the mortgaged premises be sold in favor of the two plaintiffs alone. The relief asked in the suit must necessarily be for the defendant, Helen Robertson Blacklock, as well as for the benefit of the plaintiffs, especially as, by her answer, she ranges herself on the side of the plaintiffs against Small, joins in the prayer of the bill and asks that the payment of the bond and the satisfaction of the mortgage be delared void,

and that the bond and mortgage be declared valid in the hands of Robertson, as trustee, for the benefit of herself and the plaintiffs, and that Small be decreed to pay to herself and the plaintiffs the amount of money secured by the bond and mortgage, with interest."

Where the jurisdiction depends upon the citizenship of the parties the Court will always range the parties on one or the other side of the record as plaintiffs or defendants according to their real interest in the subject matter of the controversy and not their apparent position as parties plaintiff and defendant. Naturally the citizenship of the next friend is not the test of jurisdiction in the Federal courts, since he is not even a party to the action.

*Blumenthal et al* v. *Craig*, 81 F. R., 320.

## IV.

### The Court did not Err in Excluding Testimony.

The fifth and sixth assignments of errors may be considered together and are as follows:

5. That the Court erred in refusing to permit the defendant to put the following question to witness: "Where were those personal effects that you spoke of at the time you made your application?"

6. That the Court erred in ruling out and excluding the testimony offered by the defendant to show that the plaintiff's administration was not based upon any personal estate in Fayette county, Indiana, other than the claim sued on.

An examination of the record will show that the Court was right in rejecting this evidence as it was not material or relevant to any issue in the case and for the reason that the only ground upon which defendant offered it and excepted to its exclusion was not tenable.

The record (pp. 10 and 11) shows that after the defendant's witness had stated that in the application for appointment of administrator it was represented to the Circuit Court of Fayette

County, Indiana, that deceased had left an estate of about one hundred dollars in value *in that county* to be administered, consisting of a gold watch and other personal property left by him *in the county* at the time of his death, and that such articles "were there" at the time of the application and appointment, the Court thereupon said:

"I don't see how you can attack that appointment."

Mr. Ramsey said:

"*I am not attacking that appointment.* I simply want to have the case fully presented on the question of jurisdiction. I want to make it appear that the claim he is now suing for is on behalf of the next of kin and that is the whole estate. I don't know that it is necessary, but I should like to have the record so show so that the question can be settled once for all as to the jurisdiction of the Court."

Mr. Cleveland, of counsel for plaintiff, then said:

"I don't think you can make a collateral attack."

The Court said:

"He wants to show that there was no other estate except this claim. I suppose he wants to raise the question that where an administrator is appointed merely for the bringing of suit that the jurisdiction can not be sustained. You can not attack that record."

Mr. Ramsey then put the following question to the witness:

"Q. Where were those personal effects that you spoke of at the time you made your application?"

Counsel for plaintiff objected to this question.

The Court then said:

"I don't think it is competent because that can not be used for any other purpose than to attack this record. The record is conclusive on that in this case. You can prove the fact, if it be a fact that there was no other estate than that which is claimed."

Mr. Ramsey:

"*I don't want to attack the record*, but I want to show that there was no other estate."

The Court:

"You are asking what there was in Fayette county, that I rule out." To which ruling of the Court counsel for defendant then and there excepted.

The question was put in support of the proposition already discussed (III.) that the Circuit Court was without jurisdiction.

The theory upon which defendant offered the testimony was that if there was no property of intestate in Fayette county at the time the administrator's appointment was made, except the claim for wrongful death, then the administrator in asserting such a claim was acting solely on behalf of the beneficiaries under the statute, was therefore a mere nominal party, and that the beneficiaries, citizens of the same state as the defendant, being the real parties in interest, the Federal Court was without jurisdiction, the requisite diversity of citizenship not appearing.

It is evident, however, that the question whether the administrator is a nominal or real party in an action for wrongful death does not in any manner depend upon, and is not aided by showing whether or not he had other assets of the intestate upon which to administer. The evidence was offered by defendant under an erroneous impression that, where there were no other assets, an administrator in an action to recover for wrongful death would be a nominal party, while if there were other assets he would be a real party to such action. Of course no such distinction exists in law, and therefore the question whether there were or not other assets in Fayette county than the claim for wrongful death was directed to an immaterial and irrelevant state of facts. The answer could have no legal significance or bearing upon any issue of fact or law in the case upon which defendant asked that it be admitted or upon which the defendant urged his objection to the exclusion of the testimony.

## V.

### The Administrator's Appointment.

The eighth assignment of error is as follows:

"That the administrator's appointment is void and that the Court erred in holding that such appointment could not be collaterally attacked and in excluding evidence tending to show that the appointment was void."

This claim ought not to be considered. It is an effort to here raise a question that was not presented or discussed at the

trial. It is an attempt to criticise the Court for excluding testimony that was not offered for any such purpose as counsel here claim it would have served, and to here assert the relevancy of such testimony on a ground not indicated, and in fact *expressly disclaimed* at the trial.

In objecting to the exclusion of this testimony, the overruling of which is here assigned for error, counsel at the trial not only failed to state any such ground or reason for its admission as is now attempted to be asserted here, viz., that such evidence would tend to show the invalidity of the administrator's appointment, but on the contrary, specifically disclaimed offering such evidence on any such ground or for any such purpose.

It will be seen by reference to the record quoted above that the question which was presented to the Court and which the Court ruled on was that the testimony which counsel desired to bring out for the purpose of showing the want of jurisdiction of the Federal court was not relevant for that purpose and could only be used to attack the validity of the administrator's appointment, for which purpose counsel disclaimed offering it. Therefore the Court ruled it out. No claim of error can here be predicated on a ground not urged but disclaimed at the trial. No tender was made of any testimony for any such purpose, and the trial Court excluded the testimony with that understanding and on the express statement of counsel that the competency of the testimony was urged only on the ground of its relevancy as showing that, there being no estate other than the claim for wrongful death, the citizenship of the beneficiaries, rather than that of the administrator, determined the jurisdiction of the Federal court, and not on the ground that the testimony would tend to show that the administrator's appointment was void.

At the trial the objection of defendant to the ruling of the Court excluding such testimony did not state any such ground for the objection, and it is well settled that to make avail of any such exception the record must show that the ground therefor was specifically stated at trial. In the case of *Ky. Co.* v. *Hellenthal*, 88 Fed. Rep., p. 119, the Court say:

"It has been decided again and again that an objection to evidence which does not specifically and distinctly indicate the

grounds upon which it is made is of no avail on writ of error. Citing *Mitchell* v. *Marker*, 22 U. S. App., 325; *Toplitz* v. *Hedden*, 146 U. S., 252; *U. S.* v. *Shapleigh*, 54 Fed., 126."

The rule applies obviously whether the objection is to the admission or exclusion of evidence. If to its exclusion, the ground for its admissibility should be specifically and distinctly indicated, or such ground not being brought to the attention of the trial Court will be deemed waived or at least will be of no avail on writ of error.

The rule is also stated in *Noonan* v. *Mining Co.*, 121 U. S., 400.

"The objection to the introduction of the articles of incorporation *at the trial* was that they were 'immaterial, irrelevant and incompetent' evidence. The specific objection now urged that they were not sufficiently authenticated to be admitted in evidence and that the certificates were made by deputy officers is one which the general objection does not include.

". . . . The rule is universal that where an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal."

In *R. R. Co.* v. *O'Reilly*, 138 U. S., 334, the Court say:

"It is perfectly well settled in this Court that where a case has gone to a hearing, testimony being admitted to a jury under objection, but without stating any reasons for the objection, and a verdict rendered with judgment on the verdict, the losing party *can not, in the appellate Court, state for the first time a reason for that objection which would make it good. Roberts* v. *Graham*, 6 Wall, 578; *Patrick* v. *Graham*, 132 U. S., 637."

See also: *Lithographing Co.* v. *Falk*, 20 U. S. App., 296.
*Supreme Council* v. *Fidelity Co.*, 22 U. S. App., 458.
*Case* v. *Hall*, 94 Fed., 300.

*A fortiori* must it be true that where the objection is not general, but is specific, and states a single ground for objection, another ground not specifically stated, but disclaimed at the trial, as in the case at bar, will not avail on proceedings in error.

In *Patrick* v. *Graham*, 132 U. S., 627, the Court say:

"The record before us does not show that the defendants, at the time of the trial and at the introduction of the evidence, gave any reason at all why it should be rejected; much less the reason which they now insist on. It can not be permitted that after a

case has gone to a hearing, testimony submitted to the jury, and a verdict rendered, a party for the first time shall state a reason for his objection to that evidence which would make the objection good."

Here there is an attempt by a party to state a reason for his objection to the exclusion of his testimony after the case has gone to hearing, testimony submitted to the jury, and a verdict rendered, which reason he states here for the first time, and in the teeth of his disclaimer at the trial.

In *Central Vermont Co.* v. *Ruggles*, 75 Fed., 955, the Court say :

"Referring again to the form of the objections to the admission of this testimony as stated in the record, it illustrates the propriety of the rule in the Federal courts to the effect that parties desiring to reserve exceptions in connection with such objections should state specifically and clearly the grounds thereof. In this case, if the defendant below had so stated its objections as to have brought to the attention of the Court the proper issue, this evidence would have clearly appeared incompetent and would probably have been ruled out. Apparently the defendant below *acquiesced in the presentation of the issues to the jury as they were in fact presented*, because, as we have seen, no specific objection was taken on that score. . . . . It is not for us to frame the issues to be tried in the Court below. The parties may ordinarily frame them as they see fit."

And on page 959 :

"It seems, therefore, that the only proposition of law which could have required the elimination of any of this testimony was not brought to the attention of the Court below by the objections and exceptions, and therefore, this alleged error can not receive consideration."

In the case of *St. Louis S. W. Ry.* v. *Henson*, 58 Fed., 531, it was held :

"1. In an action by a husband for the alleged negligent killing of his wife, an objection that the plaintiff has no legal capacity to sue will not be considered on appeal, where the objection is then made for the first time."

The Court say, page 532 :

"It is said in the brief of the learned counsel for the plaintiff in error that the plaintiff 'had no legal right or capacity to institute this suit in his own name. Consequently, having no le-

gal capacity to sue, the objection to the testimony of each of the witnesses offered at the proper time by the plaintiff in error should have been sustained, and no such evidence was legal under the complaint.' But no such objection to the admission of the testimony was made in the lower Court. The objection that the plaintiff can not maintain an action in his own name for the negligent killing of his wife is made for the first time in this Court. It might have been raised in the lower Court by a demurrer to the complaint, or by an objection to the introduction of the testimony, or by request for an instruction, but it was not raised in any of these modes and was not raised at all. The plaintiff in error proffered eight requests for instructions, not one of which questioned, and every one of which by implication conceded, the right of the husband to bring the suit, and rested the defense to the action on other grounds. It is the province of an appellate Court to review the rulings of a trial Court on questions actually brought to the attention of that Court and decided by it. An objection to the introduction of testimony which states no ground for the objection deserves no consideration in the trial Court and will receive none in this Court. And a party can not urge one ground in the trial Court and another on appeal. These rules are essential to preserve the character of this Court as a Court of review. Elliott, App. Proc., Secs. 770, 771. An appellate Court can consider only such matters as are properly of record, and a matter not appearing of record has no existence as a predicate for error. When the record does not affirmatively show error duly excepted to in the lower Court, and duly assigned for error there, the presumption obtains that no error was committed. As the right of the plaintiff to maintain this suit in his own name was not questioned, so far as the record shows, on the trial of the cause in the lower Court, and was not there assigned for error, this Court can not consider it."

In *Board of Com'rs* v. *Sutliff*, 97 Fed. Rep., 275, the Court say:

"This question was never presented to the trial Court by plea, proof, or request for an instruction to the jury, and no exception was ever taken, and no error was ever assigned, to any ruling upon it. It is therefore not here for our consideration. In an action at law, this is a Court for the correction of the errors of the Court below exclusively. Questions which were not presented to, or decided by that Court, are not open for review here, because the trial Court can not be guilty of error in a ruling that it has never made upon an issue to which its attention was never called. *Railway Co.* v. *Henson*, 19 U. S., App., 169, 171; *Philip Schneider Brewing Co.* v. *American Ice Mach. Co.*, 40 U. S., App., 382, 403; *Manufacturing Co.* v. *Joyce*, 8 U. S., App., 309, 311. If it should be thought that the exception to the per-

emptory charge of the Court to return a verdict for the defendant, and the assignment of error upon that ruling presented this question, attention is called to the fact that this exception and assignment present nothing for review in this case, because the bill of exceptions contains only fragmentary portions of the evidence. It is impossible for an appellate Court to determine whether or not the Court below came to the true conclusion when it directed a verdict upon the evidence in the case, unless all the evidence before that Court is presented to the reviewing Court for its consideration."

Such objection now here made for the first time injects into the case an issue not only not dealt with by the Court below, but never raised in the pleadings before the Court below.

The petition alleges that the plaintiff was duly appointed and qualified administrator, etc. (Rec., pp. 1 and 2). The answer was a general denial merely and did not put in issue the capacity of the plaintiff to sue or his right to bring the action.

It is well settled that there must be something in the nature of a special plea setting up the want of power of the administrator to sue or alleging the invalidity of his appointment.

This is true whether the findings are governed by the code practice of Ohio or by the general principles recognized by the Federal courts.

Such an issue is not tendered by a general denial, and even if counsel had placed his exception to the exclusion of the testimony upon that ground the Court would have been justified in refusing to permit the defendant to put in any proof of want of assets, situated in the county, which would be in the nature of an attack upon an appointment, the validity of which was admitted by defendant's answer to the merits without specific denial of plaintiff's representative character and capacity to maintain the action. Rev. Stat. O., 5062 and 5064.

The Ohio code requires the objection of plaintiff's want of capacity to sue, when apparent upon the face of the petition, to be taken by demurrer "specifying the ground of objection," and if not apparent upon the face of the petition, then "the objection shall be taken by answer, and if not taken by answer or demurrer, the defendant shall be deemed to have waived the objection."

"Sec. 5062. The defendant may demur to the petition only when it appears on its face either:

"1. That the Court has no jurisdiction of the person of the defendant or the subject of the action.

"2. *That the plaintiff has not legal capacity to sue.*

"3. That there is another action pending between the same parties for the same cause.

"4 That there is a misjoinder of parties plaintiff.

"5. That there is a defect of parties, plaintiff or defendant.

"6. That several causes of action are improperly joined.

"7. That separate causes of action against several defendants are improperly joined.

"8. That the petition does not state facts sufficient to constitute a cause of action."

"Sec. 5062. The demurrer shall *specify the grounds of objection* to the petition, and unless it does so it shall be regarded as objecting only that the petition does not state facts sufficient to constitute a cause of action, or that the Court has no jurisdiction of the subject matter."

"Sec. 5063. When any of the defects enumerated in section five thousand and sixty-two do not appear upon the face of the petition, *the objection* may be taken by answer; and if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the Court, and that the petition does not state facts sufficient to constitute a cause of action."

In *Ewen, administrator*, v. *Ry. Co.*, 38 Wis., 637, the Court say:

"The general denial under the code has no broader application than the general issue under the old system of pleading, and all the authorities agree that the representative character of the plaintiff was not put in issue by a plea of the general issue . . . . It is very evident that under this rule the representative character of the plaintiff would be put in issue only by a special denial of that fact in the answer, and that under the general denial the defendant did not contradict it."

To the same effect are:

*White, executor*, v. *Moses*, 11 Cal., 70.
*Cheatham*, v. *Riddle, executor*, 12 Tex., 112.
*Clifton* v. *Lilley*, 12 Tex., 130.
*Dillaye* v. *Parks*, 31 Barb., 132.
*Elektron Co.* v. *Jones Bros. Co.*, 8 Circuit Ct. Ohio, 311.
*L. & N. R. R. Co.* v. *Trammel, Adm'r*, 93 Ala., 350.
*Cheek* v. *Wheatley*, 11 Humph., 556.
*Kowanachi* v. *Askew*, 17 Ark., 595.

*Perkins* v. *Stimmel*, 114 N. Y., 369.
*Nanz* v. *Oakley*, 122 N. Y., 631.
*Mosselman* v. *Caen*, 34 Barb., 66.
*Bulkeley* v. *Iron Co.*, 77 Mo., 105, 107.
*Sanford* v. *McCreedy*, 28 Wisc., 106.
*Meyer* v. *Lane*, 40 Kan., 493.
*Ins. Co.* v. *Robinson*, 8 Neb., 452.
*Schuek* v. *Hagar*, 24 Minn., 339.

In the case of *Noonan* v. *Bradley*, 9 Wall., 394, the question is discussed and the conclusion reached that "a plea to the merits admits the representative character of plaintiff to the extent stated in the declaration, (Syllabus 5)," and that a special plea either in abatement or bar is necessary in order that the question may be raised.

See also:

*Childress* v. *Emory*, 8 Wheaton, 642.
*Kane* v. *Paul*, 15 Peters, 33.
*Hodges* v. *Kimball*, 91 Fed., 845.
*Pullman* v. *Upton*, 96 U. S., 328.

In the case of *Society* v. *Pauclet*, 4 Peters, 480, at page 501, the Court held, speaking by Mr. Justice Story:

"If the defendants meant to insist on the want of capacity in the plaintiffs to sue, it should have been insisted upon by a special plea in abatement or bar. Pleading to the merits has been held by this Court to be an admission of the capacity of plaintiffs to sue; the general issue admits, not only the competency of the plaintiffs to sue, but to sue in the particular action which they bring."

And as a matter of law the Court was right in holding that the judgment of the Circuit Court of Fayette County could not be collaterally attacked. The Circuit Court of Fayette County, Indiana, is a Court of general jurisdiction,

Revised Statutes Indiana, Sec. 1366 (Burns Ed.)
*Barkley* v. *Tapp*, 87 Ind., 25,

and have exclusive probate jurisdiction.

*Heaton* v. *Knowlton*, 65 Ind., 255.
*Hallenberg* v. *Bennett*, 88 Ind., 540.

The evidence tended to show that deceased left assets in Fayette county of the value of $100, and that such assets "were

there," *i. e.*, in Fayette county, at the time the application was made (Rec., p. 8).

The record does not contain the petition or application upon which the plaintiff was appointed administrator. There is a blank with the letters "H. I." (Rec., p. 12), which we assume stand for "here insert," where the petition should appear. We are entitled to the benefit of the presumption that a complete record would have shown the proper jurisdictional allegation, especially as defendant interposed no objection.

The record does show that the petition did contain allegations showing that the deceased had "died intestate in Fayette county, leaving assets" of the value of $100. The fair construction of this language is that such assets were left in Fayette county and the proof offered by defendant itself at the trial showed that such was the fact; that such assets were left "*in that county*" (Rec., p. 9), at the time of his death and "*were there*" at the time the application was filed.

The judgment of the Fayette Circuit Court on this fact, termed in *Reinach* v. *Ry. Co.*, 58 Fed. Rep., p. 43, a "*quasi* jurisdictional fact," is binding in collateral proceedings.

The same is held in:

*Garrett* v. *Boeing*, 68 Fed., 51.
*Lloyd* v. *Walker*, 74 Fed., 606.
*Noble* v. *Logging Co.*, 147 U. S., 165.
*Simmons* v. *Saul*, 138 U. S., 439.
*McNitt* v. *Turner*, 16 Wall., 352.
*Mohr* v. *Maniere*, 101 U. S., 424–5.
*Caujolle* v. *Ferrie*, 13 Wall., 465.

In *Comstock* v. *Crawford*, 3 Wall., 396, the Court say, at page 403:

"Whether there was a widow or next of kin or creditor, were matters for the Court, and its determination can not be collaterally impeached."

In *Holmes, Admr.*, v. *Oregon Ry. Co.*, 9 Fed., 229, will be found a very full discussion of the question and a review of authorities. In that case the Court held that the decision of the state Court on the question of inhabitancy of decedent to give jurisdiction for the appointment of an administrator was not open

to examination in a subsequent proceeding in a Federal Court.

In *M'Gehee* v. *M'Carley*, 91 Fed. Rep., 462, the Circuit Court of Appeals for the Fifth Circuit held as follows:

"The validity of the appointment of an administrator, made by a court of general probate jurisdiction, can not be questioned collaterally in an action brought by such administrator to recover for the tortious killing of his decedent, it not appearing but that a judgment in the action would render the matters involved *res judicata*."

VI.

**A Foreign Administrator May Sue in Ohio.**

The ninth assignment of error is that the plaintiff, as an Indiana administrator, can not maintain this action in Ohio.

There is, of course, no doubt that in the absence of an enabling act, a foreign administrator would have no right to maintain this or any other action in the Courts of Ohio.

But where a statute does give the right to a foreign administrator to sue it is equally well settled that he may maintain the action. *Cheney* v. *Stone*, 29 Fed., 885; *Hayes* v. *Pratt*, 147 U. S., 557.

The Statutes of Ohio give a foreign administrator the right to maintain in the Courts of Ohio an action for wrongful death of his intestate.

The first is the statute, Sec. 6133, Revised Statutes of Ohio, which reads as follows:

"Sec. 6133. An executor or administrator duly appointed in any other state or country may commence and prosecute any action or proceeding, in any Court in this state, in his capacity of executor or administrator, in like manner and under like restriction as a non-resident may be permitted to sue."

There is no authority whatever for counsel's attempt to read into this statute an exception forbidding the administrator to maintain an action for wrongful death, and counsel cites no case where a statute couched in language as broad as is here used, has been given any such construction as he contends for.

A right of action for wrongful death occurring in another state is recognized by the Statutes of Ohio, as follows:

"Sec. 6134 *a*. Whenever death has been or may be caused by a wrongful act, neglect or default in another state, territory or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other state, territory or foreign country, such right of action may be enforced in this state in all cases where such other state, territory or foreign country allows the enforcement in its Courts of the statute of this state of a like character, etc."

The law of Indiana does permit such right of action given by the Ohio Statute to be enforced in Indiana.

*Ry. Co.* v. *McMullen, Admr.*, 117 Ind., 439.
*Burns, Admr.*, v. *Ry. Co.*, 113 Ind., 167.

The next succeeding section recognizes by implication that the personal representative bringing such an action for the wrongful death occurring in another state may not have been appointed in Ohio. The section reads as follows:

"Sec. 6135. . . . . Such personal representative, *if he was appointed in this state*, with the consent of the Court making such appointment, may at any time, before or after the commencement of a suit, settle with the defendant the amount to be paid, etc."

In the case cited by counsel, that of *Maysville Ry. Co.* v. *Marvin*, 59 Fed., 91, nothing adverse to our contention is decided.

In that case the Court held that a foreign administrator derived no power to maintain an action for wrongful death in the courts of Kentucky from the statute of Kentucky which empowered a foreign administrator to "prosecute actions for the recovery of debts due to such decedents." That an action for wrongful death was not an action for the recovery of a debt nor was the liability therefor a "debt due decedent," that the right of action had no existence during the lifetime of the decedent.

The plain inference from this case is that if the statute of Kentucky, like that of Ohio, had empowered the foreign administrator to "commence and prosecute any action or proceeding in any court in the state in his capacity of executor or administrator," the suit for wrongful death could have been maintained.

Counsel urges that this section does not relate to suits brought by an administrator as a nominal party, but the statute

does not contain any such limitation, and the administrator is *not* a nominal party in enforcing the Indiana statute, authorizing him to bring an action for wrongful death of his intestate. This statute has been so construed by the Supreme Court of Indiana, which interpretation is binding here, in the case of *Yelton's Admr.* v. *Ry. Co.*, 134 Ind., 414, in which case it was held that the administrator is a not a nominal, but a real party to the action, has the sole power to control it, and in his capacity of executor or administrator bears to the fund recovered the relation of "trustee of an express trust."

The precise question was passed upon in the case of *Popp, Admr.*, v. *Ry. Co.*, 96 Fed., 465, the Court holding:

"This cause is submitted to the Court upon a demurrer to the petition upon the ground that it does not appear therefrom that the Court has jurisdiction of the action.

"It is said that, for aught that appears in the petition, the plaintiff may have been appointed administratrix in a foreign country, or in some state of the Union other than Ohio, and that under Section 6133 of the Revised Statutes of Ohio, a foreign administrator can not maintain an action 'for death by wrongful act' under Sections 6134, 6134*a* and 6135 of said statutes. This claim is based upon a construction of Section 6133, which would exclude actions for wrongful death as not being brought by the foreign executor or administrator 'in his capacity of executor or administrator,' because any damages recovered in such action would not become assets of the estate, but would be apportioned among the wife, husband, children or next of kin of the deceased. I do not think this construction sound. I think the manifest intention of the Legislature was to allow foreign executors and administrators to prosecute any action which might be prosecuted by an executor or administrator appointed in this state, 'in like manner and under like restrictions as a non-resident may be permitted to sue.'" *Duchesse D'Auxy* v. *Porter*, 41 Fed., 68; *Noonan* v. *Bradley*, 9 Wall., 394, 403.

It should also be noted that the record shows no objection taken in the Circuit Court either by demurrer or other pleading, or by objection to the introduction of evidence nor in any other way that the question was brought to the attention of or ruled on by the Circuit Court, and we submit on the principles stated and authorities cited on page — of this brief that it is now too late to raise the question in the appellate court, for the first time in the case, whether the foreign administrator had the right to bring the

action. Defendant acquiesced without question in plaintiff's assertion of such right, and can not assign for error that the trial Court did not, *sua sponte*, raise and enforce the objection. *Non constat*, if the question had been seasonably raised it might not have been within the power of plaintiff to have shown an appointment as Ohio administrator also.

In fact the eighth and ninth assignments of error ought not to be treated or considered as such. They are not assignments of error in any proper sense, they are merely *claims* made here in the appellate court without being predicated upon or purporting to relate to any error committed by the trial Court against any objection or over any exception of defendant. No such claims were suggested or presented at the trial, nor was there any ruling thereon by the Court against defendant based upon such claims.

While, therefore, we have endeavored to show that the claims are without merit, yet we insist that in any event the points were not so saved as to properly come before the Court on review of the proceedings below.

We submit, therefore, motion to affirm should be granted.

Respectfully submitted,

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# APPENDIX.

## STATUTE OF INDIANA.

An Act regulating liability of railroads and other corporations, except municipal, for personal injury to persons employed by them, fixing the rules of evidence which shall govern in such cases and providing that the decisions or statutes of other states shall not be pleaded or proven as a defense in this state. *Provided further*, That its provisions shall not apply to any injuries sustained before it takes effect, nor in any manner any suits or legal proceedings pending at the time it takes effect, and declaring an emergency. (Laws of Indiana, 1893, p. 294, Revised Statutes of Indiana, 1894 (Burns), Sections 7083-7087). [Approved March 4, 1893].

[7083] 1. That every railroad or other corporation, except municipal, operating in this state, shall be liable for damages for personal injury suffered by an employe while in its service, the employe so injured being in the exercise of due care and diligence, in the following cases:

First. When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person entrusted by it with the duty of keeping such way, works, plant, tools or machinery in proper condition.

Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employe at the time of the injury was bound to conform, and did conform.

Third. Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or in obedience to the particular

instructions given by any person delegated with the authority of the corporation in that behalf.

Fourth. Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, roundhouse, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, co-employe or fellow servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employe or fellow servant, at the time acting in the place, and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws.

[7084] 2. (*Repealed March 7, 1895.* Acts Indiana 1895, p. 148).

[7085] 3. The damages recoverable under this act shall be commensurate with the injury sustained unless death results from such injury, when, in such case, the action shall survive and be governed in all respects by the law now in force as to such actions: *Provided*, That where any such person recovers a judgment against a railroad or other corporation, and such corporation takes an appeal, and, pending such appeal, the injured person dies, and the judgment rendered in the court below be thereafter reversed, the right of action of such person shall survive to his legal representative.

[7086] 4. In case any railroad corporation which owns or operates a line extending into or through the state of Indiana and into or through another or other states, and a person in the employ of such corporation, a citizen of this state, shall be injured as provided in this act, in any other state where such railroad is owned or operated, and a suit for such injury shall be brought in any of the courts of this state, it shall not be competent for such corporation to plead or prove the decisions or statutes of the state where such person shall have been injured as a defense to the action brought in this state.

[7087] 5. All contracts made by railroads or other corporations with their employes, or rules or regulations adopted by any corporation releasing or relieving it from liability to any employe having a right of action under the provisions of this act are hereby declared null and void. The provisions of this act, however, shall not apply to any injuries sustained before it takes effect, nor shall it affect in any manner any suit or legal proceedings pending at the time it takes effect.